United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1278

To be argued by
GUY L. HEINEMANN

B
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NO. 76-1278

UNITED STATES OF AMERICA,

Appellee,

against

ROBERT L. VAN MEERBEKE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT ROBERT L. VAN MEERBEKE

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BRIEF FOR THE APPELLANT ROBERT L. VAN MEERBEKE

PRELIMINARY STATEMENT

Robert L. Van Meerbeke appeals from a judgment of the United States District Court for the Eastern District of New York (Hon. Henry Bramwell, District Judge) sentencing him, after a jury verdict, to five years imprisonment and seven years of special parole. The sentence was imposed concurrently on each of two counts in an indictment charging him with conspiracy to smuggle opium and the substantive act of smuggling. Sentence was imposed on May 28, 1976. On June 11, 1976, Appellant, Van Meerbeke, surrendered into custody, following the denial by the District Court of a motion to modify his bail pending appeal. On June

18, this Court ordered a bail modification pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure and the Appellant is currently enlarged on bail pending appeal.

ISSUES PRESENTED

1. Did the District Court err in failing either to declare a mistrial or to hold a hearing where the trial judge personally observed the Government's chief witness eating opium on the witness stand in the presence of the jury?

2. Was the defendant Van Meerbeke deprived of a fair trial by the trial judge's interruption of defense counsel during argument and during the cross-examination of the Government's witness, Fife?

Statement of Facts

Introduction

On April 14, 1975, Reuben Fife was arrested at John F. Kennedy International Airport in the possession of approximately eight pounds of raw opium. Fife subsequently pleaded guilty to a smuggling charge and received a sentence of two years imprisonment, later reduced to one and one-half years. Fife became a witness for the Government and testified in the Grand Jury and at a trial against appellant Van Meerbeke. Fife's relationship with the Government, his behavior on the witness stand and the conduct of the trial judge during Fife's testimony figure largely in this appeal.

I The Government's Proof

A. The Testimony of Reuben Fife

Reuben Fife testified on direct examination that he has known Van Meerbeke for several years (Tr. 146)* and that sometime in 1975 he and Van Meerbeke discussed smuggling drugs from overseas. In particular, they

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* References to the transcript paginated in heavy print are Tr. ___. References to transcripts received subsequent to the heavily printed numeration will be by date and page.

discussed the possibility of buying raw opium in India, smuggling it to the United States, and selling it in California. Several discussions followed and it was eventually agreed that Fife would travel to India* and return via England to Canada and the United States (Tr. 154-59). Fife and Van Meerbeke further agreed that a third individual, co-defendant Donald Jones, would meet Fife in England, attempt to take the suitcase with the opium,** and return to Canada and clear U.S. Customs with the suitcase (Tr. 150-165).

Subsequent to these plans, Fife and Van Meerbeke met Donald Jones at his antique store in San Rafael, California, and picked up the Samsonite suitcase to carry out the smuggling plan (Tr. 166-68).

On March 14, 1976, Van Meerbeke drove Fife to the airport in San Francisco to begin his flight to India (TR. 169-70). Fife's testimony on direct examination gave further details of his actions in India. He first went to New Delhi, and then to Rishakesh, and back to New Delhi where he purchased four kilograms of opium from someone he testified he knew only as "Clem" (Tr. 171-76).

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* Fife had made two prior trips to India, returning with drugs on at least one of them (Tr. 146-150).

** The opium was to be concealed in a false-bottom suit case (Tr. 160-62).

Fife testified that he had several telephone communications calling collect to his girlfriend's house in San Francisco, where he was able on occasion to speak with Van Meerbeke (Tr. 176-181). As a result of these calls, the plan changed, and Fife was to fly back directly to New York from London (Tr. 181-86).

Upon arriving at Heathrow Airport, Fife met Donald Jones and together they boarded a BOAC flight to New York* (Tr. 192-202). Fife was then arrested (Tr. 202). Donald Jones was questioned but not arrested (Tr. 408-419). Several days later, while in the Federal House of Detention, in lieu of high bail, Reuben Fife made statements incriminating Donald Jones and Robert Van Meerbeke (Tr. 216).

B. The Cross-Examination of Fife

A number of new facts, inconsistencies and untruths came out on Fife's cross-examination.

On cross-examination Fife admitted lying to the Probation Officer concerning a supposedly legitimate job that he held (Tr. 232). As to the smuggling offense,

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* Meanwhile, however, British Customs became suspicious of Fife and searched his luggage discovering the opium. This information was relayed to Drug Enforcement Administration agents, who eagerly awaited Fife's arrival at JFK Airport (Tr. 399-400).

Fife admitted that according to his version of the scheme, he was to receive approximately $12,000 profit - a fact which he had concealed from the Government even during the trial (Tr. 241-42).*

Fife also admitted lying to the Government that he had not smuggled narcotics on his prior travels to India (Tr. 243-46, and 266-67). Furthermore, in addition to admitting that he made approximately $15,000 a year dealing in narcotics (Tr. 268), Fife told the jury about his extensive and continuous use of various drugs, including periods while he was in Federal custody. He revealed (for the first time even to the Government) a gruesome tale of hiding a chip of opium in a rubber capsule which he stored in his digestive tract until he could restore it from his feces in jail (Tr. 274-78).

Fife's testimony also revealed that part of his plea-bargain with the Government, previously undisclosed, was a promise that his girlfriend Diane Ashville would not be prosecuted (Tr. 295).

Finally, when recalled to the witness stand by defense counsel, Fife finally admitted that he had

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* The Government described Fife in its opening as a courier (Tr. 92). Fife claimed that he told the Government more details concerning the financial aspects of the conspiracy the day before his testimony (Tr. 241-42), but the Government, in summation portrayed him nevertheless as a "hired" courier (Tr. 556).

invented the name "C'em" when he described his source of opium in India and then refused to name who the real source was. (Tr. 173, 339-347, 359, 510).

C. The Other Evidence Against Van Meerbeke

The Government produced summaries of numerous telephone toll records showing contacts between the following locations: Fife's apartment in San Francisco (which he shared with his girl friend Diane Ashville), Van Meerbeke's apartment in San Rafael, and Jones' house and store in Marin County. The toll records also showed collect calls made to the Fife apartment in San Francisco and Van Meerbeke apartment from India on various occasions when Fife was in that country. A further record reflected a specific call of April 13th to India by a "Bob" from Fife's apartment in San Francisco (Tr. 445-457; Gov't Ex's 9, 10 and 11).

Additionally, the toll records showed a number of calls after Fife's arrest from Van Meerbeke's apartment to the following New York locations: BOAC, U.S. Immigration, U.S. Customs, Drug Enforcement Administration, and the Federal House of Detention in Manhattan. The record also shows calls to Fife's parents' home in Duxbury, Massachusetts (Tr. 454-56; Gov't Ex. 11).

The Government also offered a telegram sent on April 17, 1975 from the telephone of Fife (and Ashville's) apartment in San Francisco to Fife in jail after his arrest. The telegram read as follows:

> "Ruebin Fife
> West St House of Detention
> Manhattan NY 10027
>
> Dear Ruebin
>
> We have contacted my attorney in San Francisco. There will be an attorney talking to you soon, he probably has, tell him what happened how much evidence they have if they have any. You have to write us and tell us whats happening please... We're trying everything. Give us a list of people that will help.

Im selling my auto in the paper
we are helping you in everyway
I will write regular letter today.
Bob"
(Tr. 206-14, 370-380; Gov't Ex. 2).

The Government also produced an advertisement for the sale of a car placed in a local California newspaper and billed to Van Meerbeke's phone number in San Rafael (Tr. 444-45; Gov't Ex. No. 7).

II The Opium Eating Incident

The most bizarre events of the trial had nothing to do with the proof in the case, but concerned the behavior of the chief Government witness, Reuben Fife. On March 29, 1976, the third day of trial, defense counsel noticed Fife swallow small objects he obtained from the floor of the witness box. Fife then admitted swallowing pieces of opium that had previously fallen into the witness box from Government Exhibit No. 1.** Fife

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* Government Exhibit No. 1 was the suitcase used to smuggle the opium. Although the bulk of opium had been removed and made a separate exhibit, pieces apparently still remained.

also then admitted swallowing pieces of opium on the previous Thursday, March 25, the second day of the trial (Tr. 368-370). In colloquy following this cross-examination, the trial judge stated that he had noticed the witness eating opium the previous Thursday, March 25th, and that some of the jurors also then saw this take place. Appellants moved for a mistrial on the ground that the witness was not competent to testify and that the witness's action would so prejudice the jury as to violate due process. The motions were denied (Tr. 371-72, 471-77).

Before sentencing, appellants moved for a new trial, submitting a statement from Reuben Fife indicating his inability to judge his state of mind while testifying.* Appellants asked that a new trial be ordered because of Fife's opium eating during the trial, and because of the Court's failure promptly to notify counsel of this fact. Alternatively, appellants asked for a hearing to attempt to learn how much opium Fife ingested and whether his ability to testify was affected. The Court denied the motion (5/28/76, 1-26).

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*At trial Fife testified that he had only "minor hallucinations" (Tr. 508). In his letter attached to the papers in support of the new-trial motion, he stated that he had "acid (LSD) flashbacks" and was "much more wasted" on the first day (March 25) he took the opium. Exhibit "A", Affidavit of Guy L. Heinemann, May 28, 1976.

III The Remarks of the Trial Judge

On numerous occasions throughout the trial, the trial judge interrupted counsel's opening, answered questions directed to the Government's chief witness - the accomplice Reuben Fife - and generally interjected himself into the proceedings as to the significance of a letter written by Fife to the Court.

During the course of the opening of counsel for Van Meerbeke, the following took place:

> MR. HEINEMANN: . . . Reuben Fife, ladies and gentlemen, had over ten thousand reasons to lie in this case. Each one of them was the days he could have done in jail if he had served the full weight of the sentence to which he was exposed and to which the agents told him he could get.
>
> I'm telling you this because I expect Reuben Fife to get on the witness stand and lie about Robert Van Meerbeke, as he's obviously done so far, but if he does, I don't want you to feel privileged or very special or unique. You see, he's already lied several times to his Honor, Judge Bramwell, several times to the Government, Mr. Clayman and that young man from the Drug Enforcement Agency, Mr. Huber, who is sitting in the audience -- he's lied, I believe, to the probation officer --
>
> THE COURT: All right, Counselor, Do you have proof that he lied to me? Do you have proof of that?
>
> MR. HEINEMANN: Yes, I do.

THE COURT: If you don't have proof, don't say that, because I have no reason to believe that, and for you to say that, I don't know what your source is, but you go right ahead.

MR. HEINEMANN: Your Honor, could we have a side bar at the moment?

THE COURT: You made the statement.

MR. HEINEMANN: I have to object to your Honor's comment.

THE COURT: Come up." (Tr. 107-08).

At the side bar, counsel moved for a mistrial on the grounds that the Court had interjected its own opinion into counsel's argument, disagreeing with him and bolstering the credibility of the Government's accomplice witness. The motion was denied (Tr. 109-110).

Several times at side bar, the trial judge sua sponte expressed great displeasure with the suggestion that the witness had lied to the judge and severely warned counsel not to make that argument (Tr. 143,234):

"THE COURT: I want you to understand that he never lied to me, because there was nothing he ever said to me that in any way I could take as a lie.

Do you understand that?

MR. BOHRER: Yes

THE COURT: Do you understand that?

MR. HEINEMANN: I do, your Honor, except there is a document that he prepared himself and it was sent to the Court and it was sent directly to you.

THE COURT: If you think --

What's that?

MR. HEINEMANN: It was --

THE COURT: It wasn't me he lied to. He might have lied to the probation officer or department, but he never lied to me. I don't want you to say that any more.

MR. HEINEMANN: I'm in a difficult position.

THE COURT: Do you understand what I told you?

MR. HEINEMANN: I do, your Honor.

THE COURT: That's what I want you to do.

MR. HEINEMANN: All right.

THE COURT: Don't say 'that you lied to Judge Bramwell." Don't put the Court into this case.

MR. HEINEMANN: Might I say he lied in a letter that was sent to the courthouse? Can I do that? Omit reference to the Court and Judge Bramwell individually?

THE COURT: You'd better omit reference to the Court and Judge Bramwell. I don't want that in this case.

MR. HEINEMANN: Your Honor is not precluding me from using the letter itself that he did write?

THE COURT: You can tell that he lied in the letter, but don't you dare put me in this case again.

MR. HEINEMANN: I'm not trying to.

THE COURT: And you, too

MR. BOHRER: I wasn't trying to, your Honor." (Tr. 235-36).

When the accomplice himself was being questioned on the letter, the Court explained its view of the document and even answered questions for the witness:

"Q: Leaving aside what took place in the court room when you pleaded guilty and your lawyer was there and Mr. Kramer was there, was anything said to you subsequent to that about how soon you would get out of prison?

A: Yes; they said don't worry about it, you'll be out in eight months.

Q: When you say they, I have to ask you who said these things?

A: After I had been sentenced and it was Mr. Kramer and my lawyer.

Q: And this is after you were sentenced?

A: Yes.

Q. And did Mr. Kramer and your lawyer say that together to you?

A: Yes.

Q: At the time that you were sentenced in front of the Court, nothing was said about that, was there?

A: No.

Q: And wasn't a question asked of you or your lawyer about any promises that were made; is that correct?

A: Yes.

Q: Did you know before the court proceeding in which you pleaded guilty that your sentence would be only eight months, or that you would get out in eight months?

MR. KRAMER: There has been no testimony.

THE COURT: I think if you read that letter of October 6th that you quoted, I think that letter would tell you that he knew he wouldn't get out in eight months; it's right in that letter, that's his letter, it's right in that letter.

Q: Mr. Fife, did you write a letter to the Court?

A: Yes.

Q: And that was an attempt to get an even more lenient sentence than the one you had received?

A: Yes.

Q: Did you represent to the Court in that letter that you had been promised and assured by Mr. Kramer and your attorney that you would be out in eight months?

THE COURT: The answer to that is no.

MR. HEINEMANN: Your Honor, I offer this letter in evidence." (Tr. 314-15).

The letter written to the Court on October 6, 1975 was in the witness's handwriting, and stated inter alia:

"The fact is that altho both Mr. Clayman and my lawyer assured me that I would be paroled in eight months, the board here never paroles drug cases with two year sentences." (Tr. 318-321; Def. Ex. H p. 3).

In connection with this letter, the Court had previously ordered the Government and Fife's attorney to submit affidavits concerning the allegations in Fife's letter that he was promised he would be released in eight months (Tr. 325-26 ; U.S. v. Rueben Fife, 75 CR 336 letter of October 24, 1975 of Richard M. Weinberg, Law Clerk of Judge Bramwell; affidavits of Assistant U.S. Attorney Charles E. Clayman and Frederic H. Cohn, Esq.).

After the letter was admitted, the following colloquy took place:

"Q: In that letter there is no question that you told the Court that you had been assured by Mr. Clayman and your attorney that you would be paroled in eight months; isn't that correct?

A: There is a little misunderstanding there.

Q: Is that what's in the letter?

A: That's what's in the letter.

Q: Did you write that to the Court?

A: Yes.

Q: Is what you wrote in the letter true or not?

A: They assured me I would be out eight months after I was sentenced.

Q: This letter was written after sentence, wa[illegible]t not?

A: Yes.

Q: Is there anything in this letter which indicates that the assurances that you received from Mr. Clayman and your lawyer were before the plea took place or after?

A: There's nothing in that letter which mentions before.

Q: And from the letter itself there is no way that a reader of this letter could tell whether your assurances that you say were given by Mr. Clayman and your lawyer came before or after the plea.

MR. KRAMER: Your Honor, we object to the defense attorney's testimony; the letter speaks for itself.

THE COURT: Not only that, it's a positive fact that that sentence he had at that time he knew he wouldn't get out in eight months, it's no question. Regardless of what Mr. Clayman and his lawyer told him, there was nothing with the Court, and he knew, if you read that lawyer, he couldn't get out.

MR. HEINEMANN: It's the man's credibility.

THE COURT: I know that his credibility is in issue but ask the next question please." (Tr. 321-22).

On another occasion, the Court interrupted and made statements of fact while the witness was being

cross-examined as to promises made to him and then refused to instruct the jury to disregard his comments:

> MR. HEINEMANN: Mr. Fife I want to ask you about any other promises that were made to you by the Government when you decided to testify for the Government in this case.
>
> Mr. Kramer asked you on your direct testimony what those promises were?
>
> A: Yes.
>
> Q: Do you remember what you told him?
>
> A: Right; that they would just write letters to everyone about my cooperation with them and anything that I said during the investigation, this trial, would not be used against me for criminal things.
>
> THE COURT: Mr. Heinemann, just for your information, when this defendant was before me for sentence there was no promise made by the Court to him and he went through the normal sentence process, so there was no promise by the Court, but I want to give it to you just for your information, so you could go right ahead and continue your cross-examination.
>
> MR. HEINEMANN: May we have a side bar, your Honor?
>
> (Whereupon a side bar conference was had.)
>
> MR. HEINEMANN: Your Honor has just stated to the jury --
>
> THE COURT: A fact.

MR. HEINEMANN: What was in your Honor's own mind and what was in the record at the time of the plea. There is no dispute about that. There is a dispute about your Honor, if I may finish my statement, is that this man's credibility --

THE COURT: Go right ahead and question him about anything, about his credibility; anything you wish to say about sentence, anything about the arrangement with the prosecutor.

MR. HEINEMANN: Your Honor's statement in the middle of my cross-examination to this jury that no promise was made, in fact telling them of a fact that only they could find in this case -- your Honor can't become a witness.

THE COURT: That happens to be the truth and the record will bear the Court out.

MR. HEINEMANN: If your Honor will instruct the jury, please, that they are the sole finders of all facts in this case, and I ask your Honor to withdraw that comment that you made to them.

THE COURT: Denied.

MR. HEINEMANN: I move for a mistrial.

THE COURT: Denied." (Tr. 292-94).

Yet another time, while the witness was being cross-examined about the fact that his girlfriend was not prosecuted, the following took place:

MR. HEINEMANN: At that time when the Court asked you what promises had been made, did your lawyer or did the Government state what those promises were?

A: I'm sure one of them did; yes.

Q: Did anyone at that time when you pleaded guilty, tell the Court that you had been promised that Diane Ashville would not be prosecuted?

A: That was just like a sort of tacit understanding.

THE COURT: For your information that was not before the Court. The first time that the Court heard that name was today when you brought it up on cross-examination. I never knew about that girl.

MR. HEINEMANN: That's my whole point.

THE COURT: Never knew about it. Go ahead, make all your points. I don't want you to leave any of them out. I never knew about that girl. Go right ahead.

Q: Your lawyer didn't tell the Court about Diane Ashville?

A: No; she was just a chick answering the phone.

Q: When you speak about a chick answering the phone, I would like to ask you this. Did the Government ever tell you that there is a statute which carries a severe sentence outlawing the use of the telephone to facilitate a narcotics transaction.

MR. KRAMER: I'm going to object.

THE COURT: Sustained. Don't answer that question.

MR. HEINEMANN: Could we have a side bar, please.

THE COURT: I'll sustain the objection.

(Whereupon side bar conference was had.)

MR. HEINEMANN: So I can make it clear to the Court what my line of inquiry is with this witness, I intend to show that his ability and attempt to get promises from the Government relates directly to his credibility in this case. There is no reflection on the Court.

THE COURT: Mr. Heinemann, when I talk you have to listen. You could ask any question you wish as to his credibility, as to any part of it that you wish, but that last question the Government objected to and it was sustained, that's it.

MR. HEINEMANN: You Honor, I only wish to object to your Honor again making a statement to the jury in the middle of my cross, which is more properly the subject of Government's redirect.

THE COURT: Mr. Heinemann, my purpose here is to see that the jury gets an impartial and fair view of what this case is all about, and I intend to do everything I can to see that they do that; and if there is anything that comes up at the time it comes up, if I feel it's proper I will tell the jury exactly what the situation is..

MR. HEINEMANN: I think that's more properly the subject of Government counsel on redirect.

THE COURT: Mr. Heinemann, I run this court, and I'll let you know that I do, and if you wish in any way to attack the credibility of Mr Fife -- anything you have to say Mr. Bohrer?" (Tr. 295-97).

At one point on the cross-examination of Fife, one of his letters to the Government was read (Def. Ex. E). The letter concerned Fife's request to serve his sentence in his preferred location - Allenwood. The trial Judge again commented sua sponte to the jury:

"THE COURT: I might say the Judge in here who specified someone for Allenwood was not me. I do not make recommendations as to any prison that any defendant goes to, and that I can assure was not Judge Bramwell.

MR. HEINEMANN: I'm not suggesting it.

THE COURT: I wanted to clear the record.

MR. HEINEMANN: It's clear the witness asked the Government. (Tr. 333)

ARGUMENT

POINT I

THE DISTRICT COURT COMMITTED ERROR IN FAILING TO DECLARE A MISTRIAL OR TO HOLD A HEARING WHEN THE TRIAL JUDGE PERSONALLY OBSERVED THE GOVERNMENT WITNESS EATING OPIUM ON THE WITNESS STAND

The details concerning Fife's conduct on the witness stand are as follows: Fife, the Government's first witness, began testifying sometime before lunch on March 25, 1976 (Tr. 144). Fife's direct examination continued after the luncheon break. During Fife's direct testimony, the Government introduced Exhibit # 1, the false-bottomed suitcase that Fife used to carry the opium from India. (Tr. 190). Fife noticed at the time that there was some loose opium* in the suitcase. (Tr. 190-191). Fife's cross-examination began that afternoon, and was continued on the next day of the trial - March 29th.

On the afternoon of March 29th, after the luncheon recess, counsel for Donald M. Jones noticed Fife insert something into his mouth from the witness stand. (Affidavit of Guy L. Heinemann, May 27, 1976 [hereinafter "Heinemann affidavit"]. When cross-examined on

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* The bulk of the opium had been removed and constituted a separate exhibit.

this, Fife admitted taking opium on the witness stand that day and also the previous day of his testimony - March 25, 1976. (Tr. 368-70).

Upon learning of this occurrence, counsel moved for a mistrial, citing the potential incapacity of the witness, and the further ground of due process (Tr. 371).

The Court denied the motion but in colloquy noted that he himself as well as the jury noticed Fife taking opium the previous day. (Tr. 372). The next day, while hearing argument on the Rule 29 motion, the Court reaffirmed that the Court and "many of the jurors" saw Fife eating the opium on the first day of his testimony near the end of his direct examination (Tr. 471-72; 475). The Court added its observations that the witness appeared lucid, but also seemed to believe that it was a small piece and to credit the witness' statement that it did not affect him (Tr. 472-73, 475-76).* The Court did nothing on either occasion to bring this incident to the attention of counsel.**

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* Counsel described the pieces taken on March 29 as one-half by one-quarter inch. (Tr. 476).

** Apparently, the Assistant U. S. Attorney was also unaware of the March 25 incident. (Tr. 475).

Fife's own initial description of the effect on him was that "[i]t doesn't really affect me that much." (Tr. 370) Of course, he drew that conclusion shortly after he had swallowed the opium.

After the trial, counsel contacted Fife, who was then in a Government facility in Massachusetts. Fife stated that it was difficult for him to tell during the trial how great the influence was. (Heinemann affidavit, p. 3).

Importantly, Fife gave additional details unknown during the trial concerning his opium-tasting activity on the witness stand. Apparently, it was not an isolated instance noticed by the trial judge on March 25th. Rather, Fife was "constantly nibbling" on that day and, of the two days on which he took opium, the effect was much greater on March 25th (Heinemann affidavit, p. 3).

In a letter written to counsel*, Fife explained that "it is only in retrospect that I can see now how

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*The letter is attached to the Heinemann affidavit submitted in support of the motion for a new trial. Since Fife was at a Government facility at the time the letter was written, he was not, presumably, under the influence of any drugs at the time.

stoned I was. At the time there was no way of telling as there was no perspective from which the symptoms of narcosis could be independently viewed." While the effect of opium varies with each individual, there is no doubt that such a drug affects ability to recall events. As said in Hansford v. United States, 365 F.2d 920, 922-923 (D.C. Cir 1966):

> "Current medical knowledge indicates that use of narcotics often produces a psychological and physiological reaction known as an acute brain syndrome which is a 'basic mental condition characteristic of diffuse impairmment of brain tissue function.' The characteristic symptoms of the syndrome are impairment of orientation; impairment of memory; impairment of all intellectual functions including comprehension, calculation, knowledge and learning; impairment of judgment; and liability and shallowness of affect."

Fife also related new information - he had also experienced "acid flashbacks" while on the witness stand (Heinemann affidavit, p. 3). Flashbacks are a recognized side-effect of extensive usage of LSD.

> "The effect of LSD changes the levels of certain chemicals found in the brain, including serotonin, which produces changes in the brain's electrical activity. This may result in hallucinations, the intensification and distortion of sensory perception, panic, violence, suicide, or a loss of sanity. Hallucinations may recur (with the same intensity) any time up to two years after the original 'trip'."
> Drug Abuse and Misuse. Drug Enforcement Administration (undated) at 16.

The nature of "flashbacks" is also discussed:

> "In some cases, illusions, or hallucinations experienced by takers of LSD have reappeared spontaneously even though they abstain from the drug. Some individuals have reported undergoing such recurrences a month or two after their last use of LSD. In several extreme instances, persons who had taken a great many doses of LSD, then stopped, reported a return of hallucinations more than a year after the last dose was taken. Recurrent episodes have occurred as long as twenty months later."
> LSD-25, A Factual Account (BNDD 1969) at 22.
> See also, Special Action Office for Drug Abuse Prevention, Answers the Most Frequently Asked Questions About Drug Abuse (1972) at 12; Drug Enforcement Administration, Drugs of Abuse (1975).

Additionally, by taking opium, Fife, as a witness, deprived the jury of his natural demeanor - an important factor in a jury's evaluation of credibility.*

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* "It is true that the carriage, behavior, bearing, manner and appearance of a witness -- in short, his 'demeanor' -- is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness."
Dyer v. MacDougall, 201 F.2d 265, 269 (2d 1952) (footnote omitted) (Opinion by Judge Learned Hand).

Despite similar arguments made below, the District Court rejected Van Meerbeke's motion for a new trial or hearing.*

There is no question that, as a general rule, all individuals are competent to be witnesses. Fed. Rules of Evidence 601.** There can be no doubt that it was not the drafter's intent to preclude inquiry into the physical condition of a witness, especially one under the influence of drugs. Rather, "the competency of a witness to testify before a jury is a threshold question which lies exclusively in the trial court's discretion. United States v. Gerry, 515 F.2d 130 (2d Cir. 1975). Gerry dealt with a challenge to a prosecution witness based

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*Fife stated his willingness to return to court to submit to examination.

**The history of Rule 601 does not seem to have contemplated situations where the witness is under a temporary physical incapacity. See Notes of Advisory Committee, Rule 601.

on his alleged mental illness, for which he was receiving psychiatric care during the trial. Gerry held the trial court could make findings that the witness's testimony was comprehensible, and such a determination would only be disturbed if clearly erroneous. United States v. Crosby, 462 F.2d 1201 (D.C. Cir. 1972). However, when there is a question of drug addiction during the trial, the court's lay opinion is insufficient, and an expert opinion should be obtained to determine whether the dosage affected the witness's ability and competency to testify. See Hansford v. United States, 365 F.2d 920, 924 (D.C. Cir. 1966); United States v. Gebhart, 436 F.2d 1252 (8th Cir. 1971).* In this trial the District Court alone (together with some jurors) saw Fife swallow opium on March 25th - the day that, according to Fife, involved the greater dosage. The District Court, without apparent reason, ignored the event and failed to alert counsel. Four days later, only because they themselves saw a recurrence, did counsel learn of Fife's activity.

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*Hansford dealt with the competency of a defendant to stand trial. It is respectfully submitted that the same standards apply to hearings to determine the competency of a witness - a position taken by the D.C. Circuit in Crosby, supra.

The duty of the Court to insure a defendant is competent is a duty that transcends the proceedings at hand and is independent of the duty of the defendant's advocate. Thus, in cases dealing with the competency of a defendant to stand trial, "the Court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence . . ." Drope v. Missouri, 420 U.S. 162 (1975). The duty to respond to changes in circumstances as to a witness are no less. United States v. Crosby, supra.* Here, the trial judge noticed an extraordinary event and failed to alert counsel or to take any steps to insure that Fife was not affected by the drugs he took.

In United States v. Crosby, 462 F.2d 1201 (D.C. Cir. 1972)**, the Government's principal witness admitted using drugs on the day of trial. The Court of Appeals remanded the conviction for further proceedings

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*An analogous duty is present when the competency of a defendant to plead guilty is an issue. See Saddler v. United States, 531 F.2d 83 (2d Cir. 1976).

**In this circuit, the only case found on the same issue --- incompetency of a witness because of narcotics usage -- was U.S. v. Tannuzzo, 174 F.2d 177 (2d Cir. 1940). In that case, after a hearing, the court found a witness competent who had not had drugs for some time before the trial.

because the District Court denied counsel access to certain records revealing treatment of the witness for mental problems at a time prior to the trial. The Court stated at 1203 that:

> "Once a trial judge is confronted by any 'red flag' of material impact upon competency of a witness, an inquiry must be made into the facts and circumstances relevant thereto."

The Court further noted that "the competency standard for witnesses may vary depending upon the importance of the witness to the case. Here, where the witness was the key witness for the prosecution, justice demands a strict standard of competency." Crosby, supra at 1203.

In this regard Fife was not just the key witness but his testimony was the backbone of the entire case against both defendants. Furthermore, his testimony was severely impeached on cross-examination. When the trial judge noticed Fife eating opium on the witness stand, the Court was "confronted by [a] 'red flag' of material impact upon competency of a witness [requiring] an inquiry . . . into the facts and circumstances . . . . " Crosby at 1203.*

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*The Government will doubtless argue that counsel failed to request a hearing or examination of Fife when they did learn of his eating opium the following week. Such a failure hardly mitigates the Court's duty to alert counsel to what it had seen and to promote an inquiry into the situation.

Since "[o]nly by a hearing can a determination be made whether any particular defendant is incompetent because of his use of drugs", Hansford, supra at 923, then only by a hearing could Fife's competency as a witness have been ascertained. The District Court's inaction on the opium incident deprived Van Meerbeke of such an opportunity and constituted reversible error.

POINT II

THE DISPLAY OF FIFE'S OPIUM ADDICTION IN FRONT OF THE JURY DEPRIVED VAN MEERBEKE OF A FAIR TRIAL

The bizzare incidents in this trial - without precedent - unavoidably prevented the jury from evaluating the evidence in a fair atmosphere.

Fife's addiction to the opium was, of course, a permissible area of inquiry on cross-examination, and related to his credibility. However, the shocking display of his addiction - seen by the jurors - could not have but distracted them from their oaths of impartiality. The revulsion that the jurors* must have experienced doubtless had a devastating effect on their deliberations. For even in the solemn act of giving

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*The Court stated that "many" jurors saw Fife eating the opium on March 25th. (Tr. 475)

testimony in a federal courtroom, Fife could not restrain his craving for the drug. Indeed, the jury could no more easily disregard a prejudicial photograph of a murder victim, see 4 Wigmore §1157 (Chat. rev. 1972), than they could ignore this graphic display of Fife's addiction. For Fife demonstrated a slavery to the very drug that was the corpus of the crime with which Van Meerbeke was charged. The "opium-eating incident" in the trial below thus created "the danger of unfair prejudice", Federal Rule of Evidence 403. When Fife's behavior was seen by the jurors the Court should have notified counsel and declared a mistrial.

POINT III

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE APPELLANT VAN MEERBEKE ADOPTS THE ARGUMENTS SET FORTH IN THE BRIEF OF APPELLANT DONALD M. JONES

CONCLUSION

FOR THE REASONS STATED ABOVE, APPELLANT's CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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October 26, 1976

United States Court of Appeals
for the Second Circuit

United States of America,

Appellee,

against

Robert 1. Van Meerbeke,

Defendant-Appellant.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Charles Esposito, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 77 Broadway, Malverne, New York
That on October 26, 1976, he served 2 copies of Brief
on

Hon David G. Trager,
225 Cadman Plaza, East
Brooklyn, New York, 11201.

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Charles Esposito

Sworn to before me this
26th day of October, 19 76

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 19 77